

# The Capability Approach and Labour Law: Identifying the Areas of Fit

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## I. Introduction

The capability approach (CA) has been highly influential in labour law discourse in recent years. Originally conceived by Amartya Sen,<sup>1</sup> and further developed mainly by Martha Nussbaum,<sup>2</sup> it has led an increasing number of labour law scholars to argue that the CA can be used as a normative justification for labour laws.<sup>3</sup> Sen developed the CA as a critique of Rawls's focus on the distribution of resources in his theory of justice. If resources are just means to an end ('the successful execution of a rational plan of life,' for Rawls<sup>4</sup>), we have to wonder whether the same level of resources will give different people the same opportunities and abilities to reach their goals. Surely people with disabilities, or otherwise detrimental conditions, will be able to do much less if given the same resources.<sup>5</sup> Ronald Dworkin attempted to rectify this problem with his scheme for redistribution to compensate for brute bad luck,<sup>6</sup> and luck egalitarians later suggested a shift of focus to 'opportunity for welfare,' or 'access to advantage.'<sup>7</sup> Sen offered a different solution. He argued that we should focus on 'capabilities' instead of resources. What's important for people is *effective, real freedom* to pursue their plans of life. Sen described our needs and wants as 'functionings,' and drew attention to the importance of capabilities to achieve these functionings. Nussbaum later

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1 See especially Amartya Sen, *Development as Freedom* (OUP 1999).

2 See especially Martha Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge UP 2000).

3 Simon Deakin and Frank Wilkinson, *The Law of the Labour Market: Industrialization, Employment and Legal Evolution* (OUP 2005) 290; Brian Langille, 'Labour Law's Theory of Justice' in Guy Davidov and Brian Langille, *The Idea of Labour Law* (OUP 2011) 101; Judy Fudge, 'The New Discourse of Labor Rights: From Social to Fundamental Rights?' (2007) 29 *Comp Lab Law & Pol'y J* 29; Judy Fudge, 'Labour as a 'Fictive Commodity': Radically Reconceptualizing Labour Law' in Davidov and Langille, *The Idea of Labour Law*, (OUP 2011) 132; Mark Freedland and Nicola Kountouris, *The Legal Construction of Personal Work Relations* (OUP 2011) 377; Supriya Routh, *Enhancing Capabilities through Labour Law: Informal Workers in India* (Routledge 2014); Kevin Kolben, 'Labour Regulation, Capabilities, and Democracy' in *Labour Law and Development* (Colin Fenwick and Shelley Marshall eds, Edward Elgar 2016) 60; Riccardo Del Punta, 'Labour Law and the Capability Approach' (2016) 32 *Int J of Comp Lab L & Ind Rel* 383. And see the contributions by these authors and others in the current volume.

4 John Rawls, *A Theory of Justice* (Harvard UP, rev ed 1999, originally published 1971) 380.

5 Sen (n 1) 74.

6 Ronald Dworkin, 'What is Equality? Part 2: Equality of Resources' (1981) 10 *Philosophy & Public Affairs* 283.

7 Richard Arneson, 'Equality and Equality of Opportunity for Welfare' (1989) 56 *Philosophical Studies* 77; G A Cohen, 'On the Currency of Egalitarian Justice' (1989) 99 *Ethics* 906.

explained that capabilities are the appropriate political goal – not functionings – because ‘citizens must be left free to determine their own course after that.’<sup>8</sup>

Although Sen originally developed this idea in response to the question ‘equality of what,’<sup>9</sup> his focus was more on freedom than equality (capabilities being a way to understand effective human freedom). In principle, one could argue in favour of redistribution towards full equality of capabilities, but Sen himself is sceptical about this idea.<sup>10</sup> He supports equality of capabilities only in the ‘sufficientarian’ sense: ensuring that everyone has a set of basic capabilities. Nussbaum similarly advocates only a *threshold* level of capabilities.<sup>11</sup> With this approach in mind, it becomes clear why the CA is better understood as advancing freedom rather than equality.

In the current chapter I will not discuss critiques of the CA. Rather, I will assume that it is valuable in general and concentrate on whether it can also prove valuable for labour law theory. I will also refrain from any discussion of the CA as a descriptive tool,<sup>12</sup> concentrating instead on its potential usefulness at the normative level. Where Sen, himself, refused to consider his theory as a basis for legal duties, and Nussbaum limited herself to legal duties at the constitutional level,<sup>13</sup> the question addressed here is whether the CA can justify labour *legislation*.

If one wants to use the CA as a normative guide regarding which laws (and/or social policies) to adopt, one must address the question, ‘what do we (as a society) want people *to be capable of*?’ There are three possible answers to this question. One option is ‘whatever they want.’ People should have capabilities to do and be what they themselves value. Sen adds the caveat of whatever people have ‘reason to value,’ but he has not developed this idea at length and it does not appear to be a major restriction. Sen believes that the choice of capabilities (assuming a choice is needed) should be left to the democratic process, and he can be understood as advancing the view that we should generally enhance people’s (non-specific) capabilities – their freedom to make their own personal choices.<sup>14</sup> I will call this option the *substantive freedom strand*.

A second option is to identify a list of capabilities that are especially important. This option requires an additional normative theory to support the choice of capabilities. Nussbaum developed an influential list of ten basic capabilities that she argued are necessary for reasons

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8 Nussbaum (n 2) 87.

9 Amartya Sen, ‘Equality of What?’ in Sterling M McMurrin (ed.), *Tanner Lectures on Human Values* (Cambridge UP 1980). See also Amartya Sen, *Inequality Re-examined* (Harvard UP 1992).

10 Amartya Sen, *The Idea of Justice* (Harvard UP 2009) 295.

11 Martha C Nussbaum, *Creating Capabilities: The Human Development Approach* (Harvard UP 2011) 38.

12 For an illuminating discussion at this level see Simon Deakin’s chapter in this volume.

13 For further development at this level, in the specific context of labour rights, see the chapters by Alan Bogg and by Virginia Mantouvalou in this volume (discussing freedom of association and the right to work, respectively).

14 See, e.g., Sen (n 10) 231-8. And see Nussbaum (n 11) 70: ‘Sen sometimes speaks as if all capabilities were valuable zones of freedom and as if the overall social task might be to maximize freedom.’

of human dignity.<sup>15</sup> Elizabeth Anderson has similarly proposed a list of capabilities in three general areas, which she argued are needed to advance ‘democratic equality.’<sup>16</sup> These are different versions of what can be called the *specific capabilities strand*.

Finally, a third option is to rely on a variety of other (non-specific) theories and goals – like the rich body of human rights law and the many justifications for various rights – to decide what we want. More specifically, we could rely on the already-existing body of labour laws with their own purposes and justifications. With this option, the CA is not independent, but rather an ‘add-on,’ or (in Sen’s terms in a slightly different context) a ‘supplementary device.’<sup>17</sup> It puts the emphasis on ensuring that the rights are *effective* – that people are actually in a position (or have a real opportunity) to enjoy them. In the context of the current chapter, the aim could thus be described as giving people a real opportunity to choose to work under decent conditions that labour laws are designed to secure. It is different from the substantive freedom strand because, here, freedom is not the main normative idea, but a supplement to some other idea (that certain rights are justified). It is also different from the specific capabilities strand because it does not require a fixed list of capabilities, nor does it require a specific normative basis for them. Accordingly, this third option can be used to justify some means and choices that will enhance the ability to enjoy the rights, but it does not offer justifications for the rights themselves. I will call this the *effective enjoyment of rights strand*.

In the growing literature on capabilities and labour law, it is possible to find all three strands (the first two explicitly, the third with some imagination). The goal of this chapter is to assess to what extent the CA can be used to explain and justify labour laws, more or less as we currently know them. To address this issue, section II sets the stage by asking what we can expect from a normative theory of labour law, and by introducing several distinctions that can prove helpful to understand the potential – and also the limits – of a CA for labour law. The following sections then move to consider the different strands in this light: section III examines substantive freedom, which has attracted most attention so far, and section IV is dedicated to specific capabilities and effective enjoyment of rights, which are somewhat related insofar as both require additional justifications.

## **II. What to Expect From a Normative Theory of Labour Law**

### ***A. The purpose of identifying a purpose***

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15 Nussbaum (n 2) 70-80. The capabilities are: life (being able to live to the end of a human life of normal length); bodily health; bodily integrity (being able to move freely from place to place, to be secure against violent assault etc.); senses, imagination and thought (being able to use the senses, to imagine, think, and reason); emotions; practical reason (being able to form a conception of the good etc.); affiliation; other species (being able to live with concern for and in relations to them); play (being able to laugh, play, and enjoy recreational activities); control over one’s environment (political and material).

16 Elizabeth Anderson, ‘What is the Point of Equality?’ (1999) 109 *Ethics* 287; Elizabeth Anderson, ‘Justifying the Capabilities Approach to Justice’ in Harry Brighouse and Ingrid Robeyns (eds.), *Measuring Justice: Primary Goods and Capabilities* (Cambridge UP 2010) 81.

17 Sen (n 1) 82.

There are five possible reasons (that I can think of) for identifying and articulating justifications of labour laws. First, understanding the purpose of a law is necessary when performing purposive interpretation of it (including the filling of lacunas). Second, when a law is challenged as unconstitutional, the examination of its constitutionality requires an assessment of the means chosen in light of the importance of the goal, a process which again requires lawyers and judges to identify the goal itself. Third, when labour laws need to be reformed and adapted to new realities and challenges, it is necessary to start by asking what we are trying to achieve with these laws.<sup>18</sup> Fourth, we need to articulate justifications for legal regulations intervening in the ‘free market’ – such as labour laws – in order to defend them against neo-liberal critiques and calls for deregulation. Fifth, for those who believe that we need to re-conceive the entire field and its boundaries, i.e. those who wish to propose radical changes to the existing model of regulating work and its role within the welfare state, it is, again, necessary to start with identifying goals and justifications. Unlike the third reason above, here the idea is not simply to improve labour laws while trying to achieve the same goals, but to radically transform the system.

Labour law scholars sometimes also suggest a need to create a new ‘narrative,’<sup>19</sup> or a new ‘paradigm,’<sup>20</sup> for the field. This need is not an independent reason for identifying the goals of labour law. A new narrative can indeed be useful to ‘sell’ labour law to people (employers? legislatures?) and gain their support; but this will be a *by-product* of adopting a theory that can be used for one of the five reasons mentioned above.

The first three reasons can be grouped together under the heading of ‘legal’ reasons because they are necessary as part of the processes of legislating, adjudicating, enforcing, and amending labour laws. In this context, in many legal systems (though not all) it is clear that purpose has to be identified at the level of *normative* justification, rather than merely at the level of the legislature’s intent at a given historical moment. Importantly, if our goal is to identify purposes (justifications) for *legal* reasons, it is necessary to show ‘fit’ with current labour laws. Accordingly, a crucial question to be examined in the following sections is this: to what extent is there ‘fit’ between existing labour laws and the CA? If (and only if) such ‘fit’ exists, the CA can be useful for practical and important tasks such as purposive interpretation of labour laws, examining their constitutionality, and proposing reforms to improve existing labour laws and/or adapt them to new realities and new challenges.

The other two reasons are not relevant for the legal process but they are important at the political level.<sup>21</sup> The fourth reason can be described as *defensive*; in many contexts, it provides a necessary support for labour laws under attack. The ability to offer a reply to a critique could

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18 For more on the first three reasons, see Guy Davidov, *A Purposive Approach to Labour Law* (OUP 2016) chapter 2.

19 Langille (n 3) 102.

20 Richard Mitchell, ‘Where are we Going in Labour Law? Some Thoughts on a Field of Scholarship and Policy in Process of Change’ (2011) 24 *Australian J of Lab Law* 45.

21 I realize, of course, that the distinction between legal and political is not clear-cut. I still find it helpful to employ it in the current context, to emphasize the differences between the different reasons for articulating goals.

have an important role in sustaining a law, but it is doubtful whether it can be used for practical-legal purposes like purposive interpretation. Arguably, there is a distinction between defensive and positive justifications. I will return to this issue in the next section.

Finally, the *radical* approach is not concerned with existing labour laws at all. Several advocates of a CA for labour law have been focusing on trying to show ‘fit’ with existing laws, while in fact their main goal is to use this approach to advance radical changes or entirely new laws.<sup>22</sup> If this is the real need, then ‘fit’ is arguably not necessary. The radical potential should be examined independently by asking ‘to what extent can the CA be used to support entirely *new* work-related laws, outside of the existing contours of labour law?’ This last question is out of the scope of the current chapter, which will focus on identifying the areas of ‘fit’ with existing labour laws.

To clarify, I am not arguing against radical changes. Such changes will have to be examined based on the details of specific proposals.<sup>23</sup> I argue that we should distinguish between the need to justify existing laws and the desire of some scholars to propose something entirely new. Assume that existing labour laws are X1, X2, X3, and so on. They are a family of laws that have separate goals behind them, but also some shared idea. Articulating the normative justifications of these laws can be useful – indeed I argue that it is necessary – for purposive interpretation, constitutional adjudication, and reforms that improve such laws and adapt them to new realities. I distinguish between these kinds of reforms – reforms that do not change the basic structure and that can still be seen as part of the X family – and radical changes. If one wants to suggest something entirely different – a new Y family of laws – then it is neither necessary nor required to claim that the Y family shares the same normative foundations as the X family. A proposal to expand the same laws to a broader group of employees or quasi-employees is still within the X family; a proposal to place responsibility on the State for work-related rights (as opposed to placing responsibility on an employer) is something entirely different. The focus of the current chapter is only on the family of laws currently known as labour law (in the international rather than the U.S. sense).

### ***B. Monist vs. pluralist theories***

Consider next the distinction between a theory that purports to be complete – offering a monist, exclusive way to think about justice – and a pluralist view that allows different theories and justifications to co-exist. Sen rejects a ‘unifocal’ approach to justice, acknowledging instead a plurality of concerns.<sup>24</sup> This approach seems very sensible to me, unless a theory rises to an unhelpful level of abstraction. There is little point in answering the question ‘what is the right

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22 See Langille (n 3); Fudge, *Labour as a Fictive Commodity* (n 3); Routh (n 3).

23 Routh, in his chapter in this volume, is therefore mischaracterizing my arguments in his introduction. In previous writings as well, I have not argued that the CA cannot be used to justify radical changes.

24 Sen, *Inequality Re-examined* (n 9) 317; Sen (n 1) 77. See also Sen (n 10) 96-102 where he critiques ‘transcendental’ theories, arguing in particular that they cannot help ‘in comparative assessments of justice and therefore in the choice between alternative policies’ at 100.

thing to do' with something that comes close to 'do the right thing'; and once we get more specific, it should be expected that there is more than one thing that we value.

None of the proponents of a CA for labour law has argued that it should be accepted as an *exclusive* normative basis for the field, at least not explicitly.<sup>25</sup> I will not assess the CA in light of this impossible standard, but rather ask whether it can be useful as one justification alongside others. It is often more plausible and more direct to understand labour laws as advancing workplace democracy, dignity, equality, distributive justice, or other such goals. At another level of abstraction, it may be more plausible to understand labour laws as designed to confront the vulnerabilities of subordination and dependency that characterize employment relationships.<sup>26</sup> The question for the following sections is therefore this: to what extent can the CA offer *another* justification for labour laws?

### ***C. General vs. specific justifications***

It is also useful to distinguish between general and specific justifications, with regard to the law(s) they aim to explain and justify. Specific justifications focus on one concrete piece of law, or sometimes several specific laws. General justifications aim to justify the entire body of labour laws, although not necessarily with a monist, exclusive justification (see above). A general justification can be presented as part of a pluralist approach. The idea is to treat labour law as a unified project and say that, *as a whole*, it is needed because of a certain justification (or several justifications). On the face of it, when looking for justifications for practical-legal reasons, it may not be clear why a general justification is needed. When we perform purposive interpretation of a provision in legislation, for example, we only need to know the purposes of this specific legislation. Nonetheless, there are terms that appear in every labour law – such as 'employer' and 'employee' – and it makes sense to interpret them in a coherent way. Not necessarily the same for every piece of legislation, but at least while taking into account the meaning given to this term in the context of other related laws (i.e. within the same body of laws). For these purposes, identifying general goals/justifications – to the extent there are any – is helpful. Of course, it can also be helpful for defensive and radical (i.e. non-legal) purposes.

Note that a combination of a monist (non-pluralist) approach with a general justification for the field is especially problematic. An attempt to find a *single* normative justification for the *entire* body of labour laws entails two significant risks. On the one hand, some of the laws can be left without justification, with the risk of being abolished, even though they can be supported with other justifications. Alternatively, if the monist justification is broad enough to cover all the current laws, it is likely to justify any other regulation in favour of workers without offering any 'stopping point' or any help with where to draw the line.

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25 Langille came close to that in previous writings (see n 3), where he put much focus on rejecting traditional justifications before proceeding to argue for the CA as an alternative justification. But in his chapter in the current volume, he clarifies that he considers the CA as coming *alongside* other justifications.

26 On all of these goals and their connection to labour laws see Davidov (n 18) chapters 3-5.

Leaving aside the monist view, can we consider enhancing human freedom or capabilities a *general* (even if not exclusive) goal of labour law? This could be possible when articulating a defensive justification, designed at a general level to deflect critiques that labour laws (as a whole) are an assault on freedom. But when searching for *positive* justifications needed for *legal* purposes, the CA cannot serve as a general goal.<sup>27</sup> Labour law is an amalgamation of solutions to various different problems concerned with employment relations.<sup>28</sup> Connecting *all* of these laws are the vulnerabilities that justify distinguishing between employment relations and other contractual relations. Therefore, the only way to explain and justify existing labour law *as a whole* is by deciphering the unique characteristics of employment relations. Elsewhere I have argued that democratic deficits (subordination, broadly conceived) and dependency (economic as well as for the fulfilment of social/psychological needs) characterize the employment relationship.<sup>29</sup> These vulnerabilities explain why intervention (i.e. labour law) is needed and why private laws setting the ‘free market’ should not apply. Additional justifications at this level include inequality of bargaining power and market failures, and other articulations are surely possible. The point here is simply that only at this level – which is not only normative but also descriptive, identifying problematic characteristics of employment – a general justification is possible. I do not argue here that such a general theory is sufficient to explain and justify labour law; it must be coupled with abstract justifications that are needed to further explain, in the context of specific laws, why these vulnerabilities are problematic.

Can the CA be conceptualized as being at the level of identifying vulnerabilities? In another recent article,<sup>30</sup> I asked whether the republican idea of non-domination can be considered a general justification for labour law. I argued that just like subordination, domination can be seen as descriptive and normative at the same time; i.e. identifying a problem in real life (domination) and explaining why it must be addressed by law. I concluded, however, that the idea of domination as defined (for other purposes) mostly by Philip Pettit does not have sufficient ‘fit’ with the characteristics of the employment relationship. As a result, it can be useful as a justification for some specific labour laws, but not for the entire body of laws. One could raise a similar question with regard to the CA, by moving from the level of abstract ideas (enhancing capabilities) to the level of identifying vulnerabilities, and suggesting that employment relations can be characterized by ‘capability deprivations.’<sup>31</sup> However, such a claim seems on the face of it extremely hard to sustain. In a study of capability deprivations, Supriya Routh<sup>32</sup> focused on rights/needs that are not available to the examined group of

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27 I have made this argument in a separate recent paper, not only for the CA but for any other high-level (abstract, philosophical) justifications as well. See Guy Davidov, ‘Using Moral and Political Philosophy to Justify Labour Law: Potential and Limits’ (unpublished draft, presented at LLRN3, June 2017).

28 Matthew W Finkin, ‘The Death and Transfiguration of Labor Law’ (2011) 33 CLLPJ 171; Matthew W Finkin, ‘Introduction: The Past and Future of Labor Law in Comparative Perspective’ in Bob A Hepple and Otto Kahn-Freund (eds), *XV International Encyclopedia of Comparative Law* (Mohr Siebeck 2014); Davidov (n 18) 34.

29 Guy Davidov, ‘The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection’ (2002) 52 U Toronto LJ 357; Davidov (n 18) chapter 3.

30 Guy Davidov, ‘Subordination vs Domination: Exploring the Differences’ (2017) 33 Int J of Com Lab L & Ind Rel 365.

31 This term was used by Sen to define poverty, See Sen (n 1) chapter 4.

32 Routh (n 3).

workers (waste pickers in India) rather than using this concept to identify the inherent characteristics of the group.

I will therefore proceed with the understanding that the CA cannot be used as a general justification for labour law (for legal purposes), and ask which specific laws (if any) it can justify. For this kind of analysis, it will be useful to divide labour law into several groups of regulations: collective labour laws, the ‘procedural’ group of laws that set the ‘rules of the game’ for the parties to negotiate on equal footing (including the right to organize, bargain collectively and strike); workplace equality laws (including anti-discrimination, pay equity, sexual harassment laws, parental leave, right to request flexible work); obligations of fairness (limitations on unjust dismissals, duties to act in good faith and proportionality); human rights/citizenship at work (privacy, free speech); wage protection (duties to ensure that wages are paid in time and regulating how they are paid, including obligations to record wages, hours, etc.); workers’ health and well-being (maximum hours, public holidays, vacation rights, health and safety laws, limitations on child labour); and distributional laws (shifting resources by setting a minimum wage, overtime payments, pensions, notice period, severance payment, intellectual property rights etc.). There is obviously some overlap between the groups, and several laws can reasonably be included in more than one group, but this is not critical for current purposes. Each law was assigned to a group based on what appears to be its dominant feature.<sup>33</sup> In the following sections, the connection between the CA and each of those groups will be examined.

### III. Using Substantive Freedom to Justify Labour Law

Understanding labour law as advancing freedom is counter-intuitive. We usually understand labour law as an intervention in the ‘free market’ – which almost by definition *limits* the freedom of the parties, to enter into contracts that society finds unacceptable (for example, for payment below the minimum wage). Nonetheless, Kahn-Freund has argued that protective legislation actually *enlarges* the worker’s freedom, by restraining the power of management. When the law puts limits on the duty of the worker to obey employer rules, it enlarges the worker’s freedom ‘from the employer’s power to command, or, if you like, his freedom to give priority to his own and his family’s interests over those of his employer.’<sup>34</sup>

This line of thought has been developed more recently by Brian Langille on the basis of Sen’s theory.<sup>35</sup> Langille does not focus on capabilities or functionings, but relies instead on a rich

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33 An additional group of laws is designed to prevent evasion from other laws. That group includes, for example, the regulation of employment through temporary work agencies. In the current context, it seems sufficient to focus on ‘primary’ laws as opposed to ‘supportive’ ones.

34 Paul Davies and Mark Freedland, *Kahn-Freund’s Labour and the Law* (Stevens & Sons 1983) 24. Kahn-Freund adds: ‘To restrain a person’s freedom of contract may be necessary to protect his freedom, that is, to protect him against oppression which he may otherwise be constrained to impose upon himself through an act of his legally free and socially unfree will’ (at 25).

35 Langille (n 3) at footnote 30 there for a list of his previous contributions on this subject. See also, more recently, Brian Langille, “‘Take These Chains From My Heart and Set Me Free’: How Labor Law Theory Drives Segmentation of Workers’ Rights’ (2015) 36 CLLPJ 257.

concept of ‘human freedom.’ This ‘human freedom’ is not freedom in the traditional liberal sense, which can quickly lead to freedom of the employer to impose detrimental work conditions and the ‘freedom’ of the worker to accept such conditions without interference from the State. Instead, Langille focuses on *substantive* human freedom, meaning ‘the real capacity to lead a life we have reason to value.’<sup>36</sup> He argues that one of the components of this freedom is human capital, which is not only instrumental, ‘but also an end in itself (directly contributing to a more fulfilling and freer life).’<sup>37</sup> He then argues that we should understand (or reframe) labour law as the law which ‘structures... human capital creation and deployment’<sup>38</sup> and its goals are ‘both the instrumental and intermediate end of productivity and the intrinsic and ultimate end of the maximizing of human freedom.’<sup>39</sup> Langille sees the focus on specific capabilities as useful only for ‘reinforcing’ the traditional view of labour law; by contrast, he considers his preferred view which focuses on substantive freedom to be more radical, leading to an entirely new vision of the field. At the same time, he insists that it explains and justifies *existing* labour laws and not only new proposals for expansion: ‘much of what our subject is about is not only protecting humans, it is liberating them, i.e. removing obstacles to the realisation of their human capital.’<sup>40</sup>

#### ***A. Substantive freedom as a defensive justification***

The idea that labour laws advance substantive human freedom is certainly convincing and helpful as a *defensive* justification; when labour laws are critiqued as an assault on freedom, it is useful to redirect attention to the freedom-enhancing aspects of these laws. Moreover, when we focus on substantive/positive freedom, rather than specific capabilities, it becomes clear that there is a strong connection between the CA and the republican idea of non-domination.<sup>41</sup> Both theories point their attention to the ability to pursue one’s goals freely. Republicanism focuses on removing barriers to this pursuit, while the CA is about building the capacity to do so. But there is a lot of overlap, because removing barriers is necessary for building capacity, which is hard to do when facing barriers. And non-domination, like the CA, is not focused only on negative freedoms, but also – indeed mostly – on positive rights. Given that the main idea of republicanism, at least as articulated by Pettit, is to advance the understanding of freedom as non-domination (as opposed to non-interference), which can be used to *support* interference in the ‘free market’, the CA and republicanism share the same defensive potential of protecting labour laws.

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36 Langille (n 3) 112.

37 Ibid.

38 Ibid.

39 Ibid., 114.

40 Brian Langille, ‘Labour Law’s Back Pages’ in Guy Davidov & Brian Langille, *Boundaries and Frontiers of Labour Law* (Hart 2006) 13, 34.

41 The connection between non-domination and capabilities is explicitly made in Philip Pettit, *Republicanism: A Theory of Freedom and Government* (OUP 1997) 158, and Philip Pettit, ‘Capability and Freedom: A Defence of Sen’ (2001) 17 *Economics and Philosophy* 1, 17-9; and in Sen (n 10) 305-9. For further discussion of this connection see Del Punta (n 3) 394-5, and Del Punta’s chapter in the current volume.

Simon Deakin and Frank Wilkinson have used the CA to justify social rights more generally.<sup>42</sup> They understand the concept of capabilities as capturing the ability of individuals to access ‘the processes of socialization, education and training which enable them to exploit their resource endowments.’<sup>43</sup> Deakin and Wilkinson explain that the right to housing, for example, is necessary as part of the need to provide ‘security in the face of risks’ – which in turn is a necessary precondition for people to realize their potential, work flexibly, and so on.<sup>44</sup> The rules of ‘social law’ thus have a ‘market-creating’ function.<sup>45</sup> Unlike Langille, Deakin and Wilkinson rely on the concept of capabilities rather than substantive freedom; but like Langille, they refrain from listing specific capabilities, preferring the more general/abstract level of ‘aiming to enable individuals to develop their capacity to make substantive choices from a range of economic functionings’.<sup>46</sup> Their understanding of the CA shares significant similarities with the *substantive freedom strand*. The general goal of Deakin and Wilkinson appears to be to defend labour law against neo-classical economists and libertarians: to explain why social laws, including labour laws, are needed to allow people to actualize their potential in the market.<sup>47</sup> They thus provide further support for the CA defensive role.

### ***B. Substantive freedom as a justification for legal purposes***

Can we also use the idea of substantive freedom (or the related idea of advancing non-specific capabilities) for *legal* purposes, as described in the previous section? The ultimate question is this: does it make sense to understand existing labour laws as designed to create opportunities/open choices for workers? There is a strong fit between this idea and workplace equality laws, which are needed to prevent artificial barriers to labour market opportunities.<sup>48</sup> Health and well-being laws can also be seen as a pre-condition to entering the labour market. It is also plausible to conceive of collective labour laws as enhancing freedom because they open up possibilities for ‘self-help’ that are not available for a worker acting individually,<sup>49</sup> but this enhancement becomes rather indirect. Such opportunities open up because the law shifts

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42 Deakin and Wilkinson (n 3) 347: ‘Social rights should be understood as institutionalized forms of capabilities which provide individuals with the means to realize the potential of their resource endowments and thereby achieve a higher level of economic functioning’. This is based on joint work also with Jude Browne, starting in Simon Deakin and Jude Browne, ‘Social Rights and the Market Order: Adapting the Capability Approach’ in Tamara Harvey and Jeff Kenner (eds), *Economic and Social Rights under the EU Charter of Fundamental Rights – A Legal Perspective* (Hart 2003) 27.

43 Deakin and Wilkinson (n 3) 291.

44 *Ibid.*, 347-48. Deakin and Wilkinson rely on the Supiot Report (Alain Supiot, *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (OUP 2001)) for this point.

45 Deakin and Wilkinson (n 3) 348. See also Simon Deakin, ‘The Contribution of Labour Law to Economic and Human Development’ in Davidov and Langille, *The Idea of Labour Law* (n 3) 162.

46 Deakin and Wilkinson (n 3) 353.

47 *Ibid.*, 348.

48 Deakin and Wilkinson (at (n3) 291-92) bring the example of a prohibition against dismissals of pregnant women. They explain that it is necessary in order to make it possible, in practice, for women to enter the labour market (i.e. ensures that their freedom to enter the labour market is not merely formal, but substantive). They also discuss domestic responsibilities of women as detrimental to their capabilities (at 286), which can provide support for work-family balance laws.

49 Brian Langille, ‘Core Labour Rights – The True Story (Reply to Alston)’ (2005) 16 *European Journal of International Law* 409 (focusing on freedom of association).

power from employers to employees (compared to the default private law rules). In this respect, it is quite similar to distributional labour laws that shift resources (such as the minimum wage).<sup>50</sup> Indirectly, every resource we get potentially opens up more choices and opportunities, thus enhancing our freedom,<sup>51</sup> but the whole idea of the CA is to move away from the focus on resources – presumably they are not a good enough proxy – and concentrate directly on capabilities/real opportunities. It is extremely difficult to justify distributional labour laws with the idea of enhancing freedom, given that this freedom (to do more with the additional resources or powers) comes at the expense of the employer’s resources and power (and therefore freedom).<sup>52</sup>

Admittedly, when we define the idea of labour law so generally, one can connect almost any regulation indirectly to such a goal. But it does not help us decide when to intervene in the ‘free market’ and does not offer any ‘stopping point’ to regulatory intervention. It has been argued by Alan Bogg, as well as by Tonia Novitz and Colin Fenwick, that the CA is not sufficiently specific to offer normative guidance for labour law,<sup>53</sup> and this seems especially true for the view that focuses on substantive freedom.

Deakin and Wilkinson have tried to offer a CA defence for the minimum wage by focusing on non-distributional aspects of this law. They argue that a minimum wage forces employers to invest in new technologies, training, skill development, and health and safety – all strategies enhancing capabilities, which employers have no incentive to pursue when they have the power to lower wages below their market rate.<sup>54</sup> This argument is certainly logical, but it seems odd to see this as the main (or even a major) goal of minimum wage laws.<sup>55</sup>

The incompatibility between distributional labour laws and the CA appears fundamental, given the nature of these laws. This significant and important part of labour law is clearly and unapologetically *paternalistic*, while the CA is decidedly *anti-paternalistic*; the focus on capabilities (as opposed to functionings) is designed to give people freedom to choose their own ways.<sup>56</sup> Langille is well aware of that fact,<sup>57</sup> so when he argues that labour laws should be

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50 On this point see also Laura Weinrib’s chapter in this volume.

51 For such an argument see, e.g., the chapters by Brian Langille and by Riccardo Del Punta in this volume.

52 Alan Bogg supports an interpretation of freedom of association constitutional provisions that includes the rights to bargain collectively and strike, and finds support in the CA for this view (see his chapter in this volume). While I wholeheartedly share his views about the proper interpretation, his arguments seem to be based on other justifications, perhaps showing that this interpretation is *not incompatible* with the CA, but not really based on it.

53 Alan Bogg, ‘Labour Law and the Trade Unions: Autonomy and Betrayal’ in Alan Bogg and others (eds), *The Autonomy of Labour law* (Hart 2015) 73, 86-95; Tonia Novitz and Colin Fenwick, ‘The Application of Human Rights Discourse to Labour Relations: Translation of Theory into Practice’ in Colin Fenwick and Tonia Novitz (eds), *Human Rights at Work: Perspectives on Law and Regulation* (Hart 2010) 1, 30-3.

54 Deakin and Wilkinson (n 3) 293.

55 For a similar view see the chapter by Hugh Collins in the volume.

56 Ingrid Robeyns, ‘The Capability Approach’ in *The Stanford Encyclopedia of Philosophy* (Winter 2016 Edition), section 3.1, <https://plato.stanford.edu/entries/capability-approach/>.

57 As Langille himself acknowledges, (n 49) 429.

‘liberating, not constraining,’<sup>58</sup> it suggests that he sees no need for substantive standards such as a minimum wage unless he ignores the fact that they are ‘constraining’ for the employer. The same is true for human rights/citizenship at work and wage protection laws. An attempt to connect them to human freedom or non-specific capabilities seems artificial and forced. It is much more fitting to understand them as placing *constraints* on employers.

There is also some inherent incompatibility between obligations of fairness and the CA. One of the reasons behind these obligations (notably, limitations on unjust dismissals) is to facilitate trust and allow the parties to make job-specific long-term investments.<sup>59</sup> In this respect, they strengthen the commitments and co-dependence of the parties, which is *detrimental* to freedom. Sometimes, perhaps often, this is what people want; after all, notwithstanding the great importance of freedom, it is also true that, in some contexts, ‘freedom is just another word for nothing left to lose.’<sup>60</sup> To enjoy the benefits of a long-term relationship, we sometimes have to relinquish some of our freedom. Labour law supports that; the CA, at least in its substantive freedom strand, does not.

We have seen that there is some ‘fit’ between the substantive freedom justification and existing labour laws, but only to a limited extent. With this in mind, it is problematic to rely on substantive freedom for practical-legal tasks like setting the scope of labour law, unless this refers to a specific piece of legislation from those noted above. Langille has argued that substantive freedom can help us by getting ‘old ideas out of the way,’ moving directly from purpose to scope without being bothered by tests to decide who is an employer/employee.<sup>61</sup> He brings two examples from Canadian case-law. One is of a person who did sewing work at her home for a contractor, who was engaged by another contractor, eventually leading at the top of a production chain to a big brand (J. Crew). The legal question was whether J. Crew should be responsible for non-payments by the contractor who directly hired the worker. The second case involved a law firm with a partnership agreement requiring all partners to retire at the age of 65. Canadian legislation prohibits mandatory retirement of employees – it is considered age discrimination – and the legal question was whether a partner is an employee for this purpose. Langille calls for a ‘worker-centered conception of labour law... that does not seek a relationship’<sup>62</sup> as the basis for labour regulation. In his view, labour law should not be about the employment relationship or any other relationship, but simply about workers – we should focus on maximizing their substantive freedom. This unsurprisingly leads him directly to concluding that J. Crew was an employer and that the lawyer-partner was an employee. But this conclusion is too easy. As far as existing laws are concerned – in Canada and elsewhere – labour law *is* about a relationship. The legal question is not whether the sewing worker is entitled to her wages from the State, but whether she has a right vis-à-vis J. Crew – i.e. whether

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58 Langille (n 35) 277.

59 On trust see Simon Deakin and Frank Wilkinson, ‘Labour Law and Economic Theory: A Reappraisal’ in Hugh Collins, Paul Davies and Roger W Rideout (eds), *Legal regulation of the employment relation* (Kluwer 2000) 29, 45-6.

60 As eloquently articulated by Kris Kristofferson in his song ‘Me and Bobby McGee’ (1969). In the song, the narrator leaves his girlfriend when she wants to settle down – a decision he later regrets. He gained freedom but lost the relationship.

61 Langille (n 35) 278.

62 Langille (n 35) 266.

J. Crew has a legal duty towards her. Similarly, the lawyer who had to retire at 65 does not ask for a remedy from society at large, the question is whether his partners at the law firm have a duty towards him, in their bilateral relationship, with the understanding that by law, business associates who do not employ one another do not have such duties.

It is of course possible to suggest a radical departure from this model. As noted, this option is beyond the scope of the current chapter. But if the goal is to justify, explain, and describe the idea behind *existing* labour laws, it is not possible to ignore the fact that they are based on an employment relationship. Labour laws very explicitly and unquestionably place responsibilities on an employer towards its employees.<sup>63</sup> Note that there are also ways in which society invests in human capital through the State using tax money. Langille's analysis, being at such a high level of abstraction, glosses over this crucial difference and its distributional implications. There are areas in which we want the market to operate 'freely,' without regulatory intervention (other than the background rules of private law); areas where we want employers to stand up to certain standards towards those who work for them, which includes redistributing resources from employers to employees; and areas where we want the State to invest in improving the lives of its citizens, or residents, or workers (depending on the context). The difficult questions of labour law are often concerned with how to put the lines between these three areas. The idea of human freedom does not offer much help with this task.

#### **IV. Combining Capabilities with Additional Justifications to Justify Labour Law**

##### ***A. Specific capabilities and labour law***

The substantive freedom strand of the CA has its advantages, but also some obvious drawbacks when one is looking for guidance for social policy. To achieve more specificity, Nussbaum developed a list of capabilities that was later adopted by other scholars as well. It is important to note at the outset that the list is meant to capture 'areas of freedom so central that their removal makes a life not worthy of human dignity.'<sup>64</sup> With this approach, capabilities can justify fundamental constitutional rights, but everything else 'will be left to the ordinary workings of the political process.'<sup>65</sup> This does not seem to leave open the possibility of justifying the many specific labour laws that every modern economy has, unless one wants to argue that all of these laws are constitutionally *necessary* and should be left out of the political process. That would be quite extreme. The question, however, is whether we can use the same ideas – the same list of capabilities – to support, propose, and justify labour legislation even if it is *not* constitutionally mandated.

Nussbaum herself refers to labour laws only indirectly, when discussing two of her ten capabilities. The first is the ability to control one's environment; she specifies that this

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63 There are some specific contexts in which the scope of labour law is broadened to cover workers who are not 'employees.' But even in such cases, except for very rare exceptions, labour laws are still based on the existence of a bilateral relationship.

64 Nussbaum (n 11) 31.

65 *Ibid.*, 32.

capability includes ‘the right to seek employment on an equal basis with others’ as well as ‘being able to work as a human, exercising practical reason and entering into meaningful relationships of mutual recognition with other workers.’<sup>66</sup> The second capability is ‘play.’ In this context, she notes that ‘working at a job and then coming home to do all the domestic labor, including child care and elder care, is a crushing burden, impeding access to many of the other capabilities on the list: employment opportunities, political participation, physical and emotional health, friendship of many kinds.’<sup>67</sup> Arguably, then, the labour laws that can be justified based on Nussbaum’s list of capabilities include workplace equality laws and health and well-being laws.

It is also possible to use other capabilities listed by Nussbaum to support labour laws. Kevin Kolben has argued that life, bodily health, bodily integrity, play, affiliation, and the ability to control one’s environment are all relevant for labour law. He uses them to justify health and safety laws, working time laws, protections against sexual harassment, workplace equality, and freedom of association.<sup>68</sup> These justifications are, often, quite indirect. But in any case, the focus remains on the same groups of laws that were also supported by the substantive freedom strand.

Further development of the CA was offered by Jonathan Wolff and Avner de-Shalit, who argued that alongside the level of functionings, we must be concerned with the ability to sustain functionings. *Insecurity* of functionings creates risk and vulnerability, which are in themselves problematic. Wolff and de-Shalit give casual employees as an example, characterizing the insecurity of being possibly out of work at any given time as a disadvantage requiring societal response.<sup>69</sup> In an attempt to identify the least advantaged members of society, they show how disadvantages ‘cluster’ together, multiplying in severity.<sup>70</sup> Possibly this idea can be used to justify specific protections for casual workers.

Elizabeth Anderson listed three aspects of functionings, which she derived from the goal of ‘democratic equality’: as a human being, as a participant in a system of cooperative production (the market), and as a citizen of a democratic state. The second of those is most relevant for current purposes. Anderson argued that it requires ‘effective access to the means of production, access to the education needed to develop one’s talents, freedom of occupational choice, the right to make contracts and enter into cooperative agreements with others, the right to receive fair value for one’s labor, and recognition by others of one’s productive contributions.’<sup>71</sup> This functioning appears to provide some basis for a small number of labour laws. Most notably, the idea of ‘fair value’ is an attempt to support a minimum wage law, but Anderson does not

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66 Nussbaum (n 11) 34. For an analysis see Del Punta (n 3).

67 Nussbaum (n 11) 36.

68 Kolben (n 3) 67-70.

69 Jonathan Wolff and Avner de-Shalit, *Disadvantage* (OUP 2007) 9, 70. They further argue that ‘the government should guarantee genuine opportunities for secure functionings’ (at 14).

70 Wolff and de-Shalit (n 68) ch 7.

71 Anderson, *What is the Point of Equality* (n 16) 318. Although Anderson used the term, ‘functionings,’ in substance she phrased them as capabilities, with a focus on opportunities.

explain how it fits into the logic of capabilities. Note also that in more recent writings, when Anderson turned her attention to the specific context of justifying labour laws, she relied first on the republican idea of non-domination,<sup>72</sup> and later on the non-democratic characteristics of the employment relationship.<sup>73</sup> In these later writings, there is no mention of capabilities.

Anderson's work on the CA – later also adopted by Judy Fudge and by Supriya Routh in the context of labour law<sup>74</sup> – relies on a combination of the CA with the goal of democratic equality. Wolff and de-Shalit, in turn, rely on a combination of the CA with the goal of security, as a supplement to Nussbaum's work which combines the CA with dignity. The question arises: is the CA really necessary here? Is it stronger/better to justify health and safety laws, for example, by deriving them from capability for life (or bodily health, or control of one's environment), which in turn is derived from dignity, instead of relying *directly* on dignity? Similarly, is it better to justify maximum hour laws by reference to capability for play which is derived from dignity, rather than simply referring to the latter as justification? Or to justify anti-discrimination laws by relying on 'effective access to the means of production' which in turn is derived from democratic equality, as opposed to directly relying on equality?

These questions have recently received some illumination from Riccardo Del Punta, who took the specific capabilities approach one step further by developing a list of capabilities tailored for labour law. Deriving the list from advanced systems of labour law, based on the idea that they reflect the result of public reasoning and democratic deliberation, Del Punta includes the following capabilities: capability for work (having a job that is fairly paid etc.); capability for human respect and dignity (working conditions compatible with that); capability for professional skills (occupational training etc.); capability for work-life balance (sufficient amount of free time etc.); and capability for voice (including by joining trade unions etc.).<sup>75</sup> He is well aware that this could be seen as 'a mere translation of labour rights into the language of capabilities,'<sup>76</sup> but ultimately finds this language useful because of its focus on freedom and autonomy. The main point is the understanding and justification of labour law not as protecting helpless workers, but as opening more choices for them and thus enhancing their freedom.

One way to understand this approach is as going back to the substantive freedom strand: people should be free (and capable) to pursue whatever they want, and in the context of work, it turns out (based on a reading of existing labour laws) that this set of capabilities is what they want. On this reading, the specific labour capabilities do not provide a *justification* for specific labour laws that can be derived from them, but rather offer a descriptive supplement to substantive

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72 Elizabeth Anderson, 'Equality and Freedom in the Workplace: Recovering Republican Insights' (2015) 31 *Social Philosophy and Policy* 48.

73 Elizabeth Anderson, *Private Government: How Employers Rule Our Lives (and Why We Don't Talk about It)* (Princeton UP 2017).

74 Fudge, 'Labour as a Fictive Commodity' (n 3); Routh (n 3).

75 Del Punta (n 3).

76 *Ibid.*, 392.

freedom. An alternative reading is that Del Punta proposes to combine the CA with the many different justifications for labour laws. I turn to this last idea in the next section.

### ***B. The capability approach as effective enjoyment of rights***

As noted in the introduction, the basic idea of the CA is that people should be capable to *be* and *do* things – that people should have choices and real opportunities – and this raises the question of *what* they should be capable of. The two common replies, discussed above, are ‘whatever they want,’ or alternatively, to develop a list of specific capabilities. The latter option requires an additional theory to decide which capabilities are the most important or necessary.<sup>77</sup> It is here that philosophers turned to human dignity or to ‘democratic equality’ for answers. But why should we limit ourselves to one specific justification from which all rights (or capabilities) should be derived? I doubt that this is the best approach, certainly not when we no longer aim to justify fundamental, constitutional rights, but rather aim to justify a multitude of labour laws that intervene in private relations. Assume, therefore, that the choice of capabilities is based not on one specific high-level goal/value, but on a multitude of justifications that already exist in the rich literature on labour law. It is possible to understand Del Punta’s list of labour capabilities this way.<sup>78</sup>

With such a combination between the CA and labour law’s many justifications, what is the normative force or significance of the CA? The answer suggests a modest option for the project of a CA for labour law. In this strand, the CA is not a justification for labour laws, which have to rely on other justifications. The CA is rather a supplement – an ‘add-on’ – that requires that we ensure effective enjoyment of the laws. This in turn can justify the choice of certain *means* to improve the enjoyment of the rights, i.e. the achievement of the goals. Take for example the idea of *voice*. It has long been considered one of the justifications for collective labour laws, sometimes as part of a more general justification of workplace democracy. When we combine this justification with the CA, it continues to stand independently and support collective bargaining laws. But on top of that, there is recognition that voice also requires *capability for voice*, which could justify certain means that can make these laws effective. The right to bargain collectively is not enough by itself to ensure voice; we have to make sure that people have the capability – a real opportunity – to actually engage in collective bargaining.

An application of this approach can be found, I believe, in a study by Simon Deakin and Aristeia Koukiadaki.<sup>79</sup> After noting that ‘the CA provides a normative framework for judging the effectiveness of institutional mechanisms in terms of how far they extend the substantive

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77 To be more precise I should note that the first option was articulated by Sen as whatever people ‘have reason to value,’ which on the face of it also requires an additional theory to decide which activities or conditions fit the qualification of *reason*. In practice, as noted above, the literature in this strand has not developed this idea at length, putting instead the focus on freedom of choice.

78 Del Punta himself notes that the CA demands ‘actual fulfilment’ of labour rights (Del Punta (n 3) 399), although he clearly sees this as coming *on top* of a normative justification for the rights themselves. I suggest here the possibility of understanding this as coming *instead*.

79 Simon Deakin & Aristeia Koukiadaki, ‘Capability Theory, Employee Voice and Corporate Restructuring: Evidence from UK Case Studies’ (2012) 33 *Comp Lab Law & Pol’y* J 427.

freedom of action of individuals,<sup>80</sup> they move to examine a specific labour law in this light: the law dealing with information and consultation. They argue that information and consultation rights can be

conceptualized as “social conversion factors” for the development of a “capability for voice” in corporate decisions making. Their success can be judged on how far they induce a process of institutional learning, based on deliberation, through which employees are provided with effective opportunities to shape the workplace environment.<sup>81</sup>

The study then uses this sophisticated approach to assess the impact of the regulations on employee voice *in practice*. In other words, arguably, it ultimately leads to an examination of the effectiveness of the law in light of the purpose (in this case, voice). In the particular study this question was examined empirically, leading to proposals on how the potential of information and consultation rights can be materialized effectively.

This approach is consistent with the purposive approach, which can be used not only for purposive interpretation, but also to ensure that the legal means can achieve the goals, and solve the problems that I described elsewhere as a ‘mismatch’ between goals and means.<sup>82</sup>

## V. Conclusion

The CA is a welcome addition to labour law theory. It enriches the discourse on justifications for labour law and offers new insights on the need for such laws and on the best way to structure them. Others have already made the case for a CA for labour law. The goal of the current contribution was to assess this endeavour from a friendly yet critical perspective in order to help the understanding of the CA’s proper role within labour law theory.

As a starting point, I showed that the CA cannot offer a monist, exclusive justification for labour laws, and also that it would be difficult to use it as a normative basis for the labour law project as a whole, rather than only for specific laws. A further distinction that should be acknowledged is between attempts to explain and justify *existing* labour laws (which can also include some concrete corrections or amendments) and proposals for radical changes to the system of work regulation. The chapter did not address the latter issue, except to argue that it has to be assessed independently; if the CA is invoked to justify a radical change, there is no need to show ‘fit’ with existing labour laws.

In contrast, justifying existing labour laws requires such a ‘fit,’ and the chapter looked for the areas in which it can be found. At this juncture I employed another distinction, between articulating justifications for *legal* reasons (notably, purposive interpretation) and doing so for *defensive* reasons (i.e. supporting the project against libertarian and neo-classical economic

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80 Ibid., 433-4.

81 Ibid., 434.

82 Guy Davidov, ‘Re-Matching Labour Laws with Their Purpose’ in Guy Davidov & Brian Langille (eds), *The Idea of Labour Law* (OUP 2011) 179; Davidov (n 18) chapter 1.

critiques, which is important in itself but does not positively provide a normative basis). In this light, I examined three strands within the CA to labour law, distinguished by their approaches towards the question of what people ought to be capable of.

The first strand, concerned with substantive freedom, is not focused on any specific capabilities, but on enhancing people's capabilities (and thus freedom) generally. This is very helpful as a defensive justification. As for legal purposes, it can be connected with workplace equality law, health and well-being laws, and possibly collective bargaining laws. Substantive freedom can hardly be seen as the *only* or *main* justification, in either of these cases, but it is certainly useful as an *additional* justification in this significant part of the labour law apparatus. The second strand focuses on a specific list of capabilities, derived from a high-level justification like dignity. The list of capabilities developed for constitutional law purposes proved to be partially helpful for labour law as well – it can be used as a justification for some of the same laws mentioned above. Again, it is not the only or main justification, and the list certainly cannot support all labour laws. Most notably, labour laws that are designed mostly to redistribute resources from employers to employees are difficult to justify by these freedom-centred approaches.

This difficulty has led scholars, understandably, to develop a list of capabilities unique to labour law, rather than relying on a list designed for other purposes. But if we compile a list based on existing labour laws, the question arises whether it adds a normative justification or simply describes existing labour laws with the addition of the word 'capability' before them. I offered two possible readings, both of which maintain that developing this new list is a worthwhile exercise, but perhaps more modest than some have argued. On one interpretation, the list of labour capabilities is not normative but descriptive; it involves listing capabilities that, as a matter of practice, people across legal systems consider valuable. This list can be used to support the basic normative idea of substantive freedom (i.e. support for the first strand). The second interpretation leads to what I identified as a third strand: the CA not as offering justification for labour laws but, more modestly, as demanding effective enjoyment of these laws – a real opportunity (and thus, capability) for workers to benefit from labour laws as a matter of practice. In such a case, the laws require their own separate justifications – that can be found, of course, in the rich labour law literature – and the CA adds a justification for *means* that will make them effective.

Overall, the chapter shows several ways in which a CA for labour law can be useful, while at the same time arguing that such a justification should not be over-extended. Hopefully this analysis can assist future research on this topic by identifying the areas of 'fit' between the CA and labour law, which offer the most promise for further development, and also by suggesting for those seeking to use the CA as a vehicle for radical reforms to skip the unnecessary efforts to show 'fit' with existing laws and move directly to proposing concrete reforms that the CA can justify.